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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~989~~ 130

ISRAEL KAHAN, JACOB GELLER,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

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MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the order of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered December 28, 1959, be affirmed and/or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

The defendants were duly arraigned on a verified complaint filed May 14, 1959, charging them with violating Sections 34.00(a), 39.04, and 33.15 of the Los Angeles Municipal Code, in Counts I, II, and III, respectively. The case was set for a trial by jury on June 10, 1959, in Division 70 of the Municipal Court of the Los Angeles Judicial District and was subsequently transferred to Division 69 of said court for trial. The defendants were acquitted of Count I and convicted of Counts II and III. An appeal was duly taken to the Appellate Department of the Superior Court, whereupon the judgment of the lower court was affirmed. The defendants lodge their appeal in this Court by virtue of Title 28, United States Code, Section 1275(2).

I.

The Purported Federal Questions Before This Court Were Never Presented to the State Courts.

The transcript of docket reflects the fact that the appellants failed to raise any constitutional question by demurrer to the complaint, as provided in Section 1004, Penal Code of the State of California. (See App. A, p. 1.) It further shows a pronounced absence of a motion for the arrest of judgment, under Section 1185, Penal Code of the State of California. (App. A, p. 1.)

The original Reporter's Transcript indicates that a singular constitutional assault was made, the motion to dismiss Count I, Section 34.04(a) of the Los Angeles Municipal Code. [Original Rep. Tr. p. 2, line 20, to p. 3, line 12.] The appellants were acquitted of this charge.

The motion to dismiss Count II, Section 39.04, Los Angeles Municipal Code, was predicated upon a non-fed-

eral ground, a purported variance between the pleading and proof. [Original Rep. Tr. p. 73, lines 1-6; also p. 72, lines 3-26.]

A motion for a directed verdict was recorded in the original Transcript of Docket as to Counts I and III, p. 2 (Sec. 33.15 Los Angeles Municipal Code). It does not appear in the original Reporter's Transcript, however. Since no grounds appear in the record, it must be presumed that the appellants asserted through their motion the only ground available upon which such a motion could be made under California law. It is:

> "Disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such verdict were given."
>
> *Estate of Lances*, 216 Cal. 397, 400; 14 P. 2d 768.[1]

Hence, it is clear that merely a question of the extent and cumulation of evidence was thus placed before the trial court. Certainly, this does not purport to raise a federal issue. Evidentiary questions are state matters. (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031.) Assuming for the sake of argument that a constitutional question could be inferred from such a motion, it nevertheless still lacks the necessary punctilio in naming just how the federal constitution has been offended.

Therefore, by the failure to raise constitutional questions at the trial level, the Appellate Department of the Superior Court, bound by established California law, did

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[1]There is no statutory provision under California law for such motion.

not and could not examine them afresh. (*People v. Alvidrez*, 158 Cal. App. 2d 209; *MacKenzie v. Anglo*, 82 Cal. App. 2d 254, 263). One cannot sleep upon his guarantees and then for the first time assert them on appeal. Sandbagging for appeal is simply not permitted in California.

This Court has consistently held that a constitutional right may be forfeited in a criminal case by failure to make a timely assertion of it. (*Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834; *Michel v. Louisiana*, 350 U. S. 91, 100 L. Ed. 83, 92.) The appellants' claim lacks the necessary currency.

The next corollary that must follow is an established rule of this Court: that a refusal to review federal questions will lie when they are not presented to the highest state court. (*Hedgpeth v. North Carolina*, 334 U. S. 806, 92 L. Ed. 1739.)

It is not to be idly observed that this precise defect exists when one scrutinizes the constitutional complaints lodged in the Appellate Department of the Superior Court and those which are now placed before this Court. With possibly one exception, the challenges of constitutionality contained in the jurisdictional statement are simply different from those tardily presented to the state court. (See App. B, pp. 2-4.)

It is fundamental that the reluctance of the federal courts to issue injunctions against city officials restraining their enforcement of criminal ordinances, does lead them to adopt the most innocent interpretation of the ordinance attacked a unconstitutional until the state courts have ruled otherwise, or, at least until local officials have acted on an interpretation making the ordinance unconstitutional. (*City of Manchester v. Leiby*, 117 F. 2d 661.)

II.

The Highest State Court Affirmed the Judgment on Valid State Grounds.

The highest state court having jurisdiction of this case, the Appellate Department of the Superior Court, delivered a one sentence opinion: "The evidence is sufficient to support the conviction." (See App. A, p. 1, Jurisdictional Statement.) This "Memo." is tantamount to no opinion at all. However, if considered as such, it indicates that the state court summarily disregarded the purported constitutional issues and decided the cause on valid state grounds.

The ordinances challenged by appellants include a number of alternative acts linked together by the preposition "or" (see App. B of Jurisdictional Statement), upon any one of which the court could have based its decision. For example, under Section 39.04 of the Los Angeles Municipal Code the appellants could have been convicted of permitting to remain on the premises "any accumulation of offal" rather than "material which creates offensive and obnoxious odors or promotes fly breeding." Under Section 33.15, Los Angeles Municipal Code, appellants could have been found to have caused [*knowingly*][1] (*People v. Forbath* (1935), CR A 1168; 5 Cal. App. 2d Supp. 767), the contents of a urinal to flow on the premises.

It is submitted that the state court merely affirmed the judgment without opining the law of the case. When the State Appellate Court delivers no opinion, and it appears that the judgment *might* have rested on non-federal

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[1]Curiously, the Appellate Department has determined that this public health ordinance would require *mens rea*, or scienter.

grounds, this Court will not take jurisdiction to review the judgment. (*Stembridge v. State of Georgia,* 343 U. S. 541, 96 L. Ed. 1130).

III.

Conclusion.

Since the appellants failed to seasonably assert their purported constitutional claims, and since the decision of the Appellate Department of the Superior Court never reached a single constitutional issue, the appellee submits that appellants present no substantial question for decision of this Court. It is therefore urged that the order from which the appeal is sought should be affirmed, or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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APPENDIX A.

Stats. 1951, c. 1674, p. 3841 (*Penal Code Section 1004*).

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears on the face thereof, either:

(1) If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

(2) That it does not substantially conform to the provisions of Sections 950 and 952, and also 951 in case of an indictment or information;

(3) That more than one offense is charged, except as provided in Section 954;

(4) That the facts stated do not constitute a public offense;

(5) That it contains matter which, if true, would constitute a legal justification or excuse for the offense charged, or other legal bar to the prosecution.

Stats. 1951, c. 1674, p. 3851 (*Penal Code Section 1185*).

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant on a plea of former conviction, former acquittal, or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, Penal Code, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must immediately be entered in the minutes.

APPENDIX B.

1. Pertinent portions of Appellants' Opening Brief in the Appellate Department of the Superior Court. (Page 6, lines 11 to 28):

> UNCONSTITUTIONALITY OF L. A. MUNICIPAL CODE 39.04 and 33.15 IN ITS APPLICATION TO THESE PARTICULAR DEFENDANTS.
>
> 1. That the ordinance 39.04, is unconstitutional, because police regulations must be reasonable and free of oppression. This ranch is operating in an area zoned for the activity taking place. Inherent in the operation of this chicken ranch are such things, including, but not limited to, odors and flies.
>
> 2. This prosecution under Count 3, Los Angeles Municipal Code 33.15 is a denial of equal protection of the laws. Such is the case, because it is discriminatory as to these defendants, since the usual 24 hour period or more allowed by the Health Department for the correction of defects was not given in this instance.
>
> 3. This prosecution under Count 3, Los Angeles Municipal Code 33.15 is a violation of due process and equal protection of the laws in that the direction to abate the sewage nuisance on April 29, 1959, within 24 hours, was given concurrently with the filing of a Complaint in Los Angeles Municipal Court on April 29, 1959.
>
> Page 53, also, Pages 65, 66, and 67 of the Transcript.

2. Pertinent portions of Appellants' Petition for Rehearing. (Page 1, lines 21 to 32; Page 2, lines 1 to 32; P. 3, lines 1 to 6):

I

The City Ordinance, L. A. M. C. 39.04, under which Appellants were convicted is arbitrary, capricious and unreasonable, on its face and as construed and applied is violative of the Fourteenth Amendment to the United States Constitution and has resulted in a miscarriage of justice under Article VI, Section 4½ of the California Constitution for the following reasons:

1. That there was no standard for the trier of fact to apply. Inherent in the operation of a chicken ranch are such things, including, but not limited to, fly breeding and odors. That there is nothing in the ordinance to distinguish an activity in which "manure, garbage, offal, rubbish, stagnant water, and filthy and offensive matter, and a material which created offensive and obnoxious odors and promoted fly breeding" *are inherent in the operation of said activity from an activity in which said things are not inherent.*

That fly breeding commences the moment a chicken deposits its manure on the ground and an adult fly lays its eggs in said manure. This is almost instantaneous, because chicken manure is one of the most natural breeding grounds for flies. Further, fly larvae buries itself in the ground almost as much as 4 feet and cannot be eradicated by insecticides or other means. It would appear from the wording that a person is in violation of 39.04 L. A. M. C. for just allowing manure to drop on the premises. The

attention of the Court is called to L. A. M. C. 34.00 (a), which provides for removal of manure at least twice a week, which has dropped on the premises. L. A. M. C. 34.00 (a) appears to allow the dropping of manure *by chickens on a chicken ranch,* but provides for at least twice a week removal of the accumulation from the premises if it promotes fly breeding and odor L. A. M. C. 39.04, which is in issue, does not allow *any* accumulation of manure at all for any length of time which promotes fly breeding and odors. The implication to be drawn from this is that the application of 39.04 L. A. M. C. to a chicken ranch is improper.

2. *There must be a standard so that the chicken rancher knows at what point he is in violation of the law. There must be scienter on his part that the standard has been violated.*

Is there violation of law when larvae are found on the premises? Or, is it a violation of law when the next stage, fly pupae, are found on the premises? Or is the standard the existence of a public nuisance?

Fly larvae and earthworms are somewhat similar in appearance. What if the chicken rancher believed the maggots were earthworms? Also, the mere presence of flies does not mean the ranch in question is breeding them, for chicken manure attracts flies from other areas.

For the foregoing reasons, the appellants contend that L. A. M. C. 39.04 was unconstitutional in its application to these appellants, and the evidence was therefore insufficient to support the conviction.